

No. 84-1160

JUL 31 1985

ALEXANDER L. STEVENS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON
COUNTY, OHIO, HON. NORMAN A. MURDOCK,
HON. JOSEPH M. DeCOURCY, JR., AND
HON. ROBERT A. TAFT, II,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 15, 1985
CERTIORARI GRANTED JUNE 17, 1985

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Findings of Fact, Opinion and Conclusions of Law and Decision of Court of Appeals are contained in Petition for Certiorari, Appendix B and A respectively.

**UNITED STATES DISTRICT COURT
DOCKET ENTRIES**

4-20-81	No. 1	COMPLAINT — Summons issued USM /abc
5-27-81	No. 5	ANSWER of defts Murdock, Wood, & Taft, II
3-17-83	No. 38	CIVIL MINUTES: Trial to the Court begins 3-14-83 before Judge Carl B. Rubin. All parties and counsel present. Mot. for separation of witness by pltf — GRANTED. Pltfs testimony begun, witnesses called, exhibits presented. Case is continued on 3-16-83 - 3-16-83 Plt mot. for mistrial is DENIED — Plts continues and rests. Motions to dismiss by both City and County defts is taken under advisement. Defts case commences on 3-17-83 and concludes. — Action is SUBMITTED. DEPOSITIONS USED IN TRIAL are as follows: William Whalen, Dr. Pembaur, Sheriff Lincoln Stokes, Russell Jackson.
		L Kuppin Ct. reporter
4- 5-83	No. 39	FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW: pltf suffered no Constitutional deprivation pursuant to policy or custom of defts. Accordingly, Pltf's complaint is dismissed at plaintiff's costs
4- 5-83	No. 40	JUDGMENT ENTRY cmte/ac
5- 3-83	No. 42	NOTICE OF appeal by pltf

**GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

1983

- 5/ 6 1) Copy Notice of Appeal, filed; and cause docketed.

1984

- 10/18 15) Judgment of the District Court is affirmed in part, reversed in part and the case is remanded for further proceedings, each party to bear its own costs (Kennedy, Jones and Cohn, JJ.)
- 10/18 16) Opinion by Jones, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Case No. C-1-81-412

BERTOLD J. PEMBAUR, M.D.
430 Rockdale Avenue
Cincinnati, Ohio 45229

Plaintiff

vs.

CITY OF CINCINNATI,
an Ohio municipal corporation
City Hall
801 Plum Street
Cincinnati, Ohio 45202

HAMILTON COUNTY,
a County of Ohio
222 Hamilton County Court House
1000 Main Street
Cincinnati, Ohio 45202

HON. LINCOLN J. STOKES,
Sheriff
Hamilton County Court House
1000 Main Street
Cincinnati, Ohio 45202

HON. MYRON J. LEISTLER,
Chief of Police
Police Division
Department of Safety
City of Cincinnati
310 Ezzard Charles Drive
Cincinnati, Ohio 45214

HON. NORMAN MURDOCK,
Hamilton County Commissioner
Hamilton County Court House
1000 Main Street
Cincinnati, Ohio 45202

HON. ROBERT A. WOOD,
Hamilton County Commissioner
Hamilton County Court House
1000 Main Street
Cincinnati, Ohio 45202

HON. ROBERT A. TAFT, II
Hamilton County Commissioner
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HON. WILLIAM P. WHALEN, JR.,
Assistant Hamilton County
Prosecutor
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1000 Main Street
Cincinnati, Ohio 45202

HON. RUSSELL L. JACKSON,
Investigator for Hamilton
County Prosecutor
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Cincinnati, Ohio 45202

JOHN DOE ONE
Police Officer
Police Division
Department of Safety
City of Cincinnati, Ohio
310 Ezzard Charles Drive
Cincinnati, Ohio 45214

JOHN DOE TWO
Police Officer
Police Division
Department of Safety
City of Cincinnati, Ohio
310 Ezzard Charles Drive
Cincinnati, Ohio 45214

JOHN DOE THREE
Police Officer
Police Division
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JOHN DOE FOUR
Police Officer
Police Division
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Cincinnati, Ohio 45214

JOHN DOE FIVE
Police Officer
Police Division
Department of Safety
City of Cincinnati, Ohio
310 Ezzard Charles Drive
Cincinnati, Ohio 45214

JOHN DOE SIX
Police Officer
Police Division
Department of Safety
City of Cincinnati, Ohio
310 Ezzard Charles Drive
Cincinnati, Ohio 45214

JOHN ROE ONE
Deputy Sheriff
Hamilton County Court House
1000 Main Street
Cincinnati, Ohio 45202

JOHN ROE TWO
Deputy Sheriff
Hamilton County Court House
1000 Main Street
Cincinnati, Ohio 45202

Defendants

COMPLAINT
(Filed April 20, 1981)

1. This is an action brought under 42 U.S.C. § 1983 and the statutory and common law of the State of Ohio by the Plaintiff for redress of the injuries suffered to his liberty and property through the deprivation of rights, privileges and immunities secured by the Fourth and Fourteenth Amendments to the Constitution of the United States and by the Constitution and laws of the State of Ohio.

2. The Plaintiff has been injured by the deprivation of his rights as a citizen to be secure in his property from trespasses, illegal searches and seizures, and by the deprivation of his right to be compensated for property taken from him.

3. Plaintiff has been deprived of his rights through the reckless, wanton, malicious, intentional, and willful acts of Defendants and their agents and employees and through the arbitrary, discriminatory and capricious abuse of public power.

4. Plaintiff's claims arise out of actions perpetrated under color of the laws of the State of Ohio and the political subdivisions and instrumentalities thereof.

5. Plaintiff seeks damages, compensatory and punitive, plus costs and attorneys' fees from Defendants herein for depriving Plaintiff of his rights.

JURISDICTION

6. This Court has jurisdiction over this action under 28 U.S.C. § 1343(3), 28 U.S.C. § 1331, and Article 3, § 2 of the Constitution of the United States. This action involves an amount in controversy, exclusive of interest, costs and attorney's fees, in excess of \$10,000.00.

7. The injuries caused by Defendants and the acts perpetrated by the Defendants and their agents and employees occurred either entirely or in substantial part in Hamilton County, Ohio, which is in the Southern District of Ohio, Western Division.

8. This court has jurisdiction over the state law claims by virtue of its ancillary and pendant jurisdiction.

PARTIES

9. The Plaintiff, Bertold J. Pembaur, M.D., is a foreign-born citizen of the United States and a resident of Hamilton County, Ohio. He is a Doctor of Medicine, licensed to practice in the State of Ohio, and maintains an office for the practice of medicine known as the Rockdale Medical Center in Cincinnati, Ohio.

10. Defendants Norman Murdock, Robert A. Wood, and Robert A. Taft, II, are the duly elected Commissioners of Hamilton County, Ohio.

11. Defendant Lincoln J. Stokes, at the time of the events alleged herein, was the duly elected Sheriff of Hamilton County, Ohio, and still holds that office of public trust.

12. Defendant Myron J. Leistler, at the time of the events alleged herein, was the duly appointed Chief of Police for the City of Cincinnati, Ohio, and still holds that office of public trust.

13. Defendant William P. Whalen, Jr., at the time of the events alleged herein, was a duly appointed Assistant Prosecutor for Hamilton County, Ohio, and still holds that office of public trust. Said Defendant participated in the illegal searches and trespasses alleged herein, personally served war-

rants, and generally acted as an investigator and process server rather than as a prosecutor.

14. Defendant Russell L. Jackson, at the time of the events alleged herein, was a duly appointed Investigator for the Hamilton County Prosecutor's Office, and still holds that office of public trust.

15. Defendant John Doe One, at the time of the events alleged herein, was a duly appointed Cincinnati police officer who participated in the intrusion of Plaintiff's offices on April 26, 1977.

16. Defendants John Doe Two, John Doe Three, John Doe Four, John Doe Five and John Doe Six, at the time of the events alleged herein, were duly appointed Cincinnati police officers who participated in the intrusion into Plaintiff's offices on May 19, 1977.

17. Defendants John Roe One and John Roe Two, at the time of the events alleged herein, were duly appointed Hamilton County deputy sheriffs who participated in the intrusion into Plaintiff's offices on May 19, 1977.

18. Defendant Hamilton County is and was at all times alleged herein a Political Subdivision of the State of Ohio.

19. Defendant City of Cincinnati is and was at all times alleged herein a Municipal Corporation and political subdivision of the State of Ohio.

OPERATIVE FACTS

20. On April 26, 1977, a Cincinnati police officer, two State Highway Patrolmen and three employees of the State Welfare Department, Defendant Russell L. Jackson, and Defendant William P. Whalen, Jr. entered Plaintiff's offices at the Rockdale Medical Center to execute a search warrant. These individuals seized Plaintiff's property, including a vast number of medical records not covered by the warrant, and disrupted Plaintiff's office operations, rendering it impossible for Plaintiff to conduct his business of delivering medical care to his patients.

21. At approximately 2:00 p.m. on May 19, 1977, two Hamilton County Deputy Sheriffs arrived at Plaintiff's

Rockdale Medical Center in Cincinnati to execute two writs of attachment for the arrest of Marjorie McKinley and Kevin Maldon, M.D., employees of the Plaintiff, who were wanted as witnesses to appear before a Grand Jury.

22. Plaintiff, after reading the writs, refused to permit the Defendants or their agents or their employees to enter the private working area of the clinic and asked them to leave the premises.

23. Two Cincinnati police officers arrived and told the Plaintiff that the writs were in order and that he should permit Defendants and their agents and employees to enter the private working area of Plaintiff's office. Plaintiff again refused to permit them to enter the premises and ordered the Defendants and their agents and employees to leave.

24. At approximately 4:00 p.m., with five Cincinnati police officers and two deputy sheriffs present, the door to the private working area was broken down and destroyed by Defendants and their agents and employees, using an axe and a sledgehammer that were the property of the Fire Division of the Department of Safety of the City of Cincinnati. The Defendants and their agents and employees then illegally searched the clinic for the employees named in the writs. Defendant Whalen, again acting in his role as investigator rather than prosecutor, arrived on the scene and joined in the illegal search and trespass.

25. At no time did the Defendants or their agents and employees obtain or attempt to obtain a search warrant so as to legally enter on May 19, 1977 the premises of Plaintiff's clinic; nor did exigent circumstances require the immediate entry into Plaintiff's private offices to arrest the individuals named in the writs.

26. Each defendant and his agents and employees, under color of state law and not in good faith, acted outside the scope of his respective office or arbitrarily, unreasonably and grossly abused the lawful powers of his office to deprive the Plaintiff of his rights.

27. Defendants and their agents and employees, under color of state law and not in good faith, acted illegally, inten-

tionally, recklessly, willfully and wantonly and ordered their agents and employees to perform illegal acts for the purpose of depriving the Plaintiff of his rights. The supervisory officials who are named Defendants herein had the power and opportunity to exercise control over their subordinates but showed deliberate indifference to the deprivations of Plaintiff's constitutional and legal rights caused by their agents and employees.

28. Defendant Myron J. Leistler, when asked by a City Council member about the intrusion into the Plaintiff's offices on May 19, 1977, on behalf of himself and the City of Cincinnati ratified and approved the conduct of the City of Cincinnati police officers who participated in the illegal intrusion and trespass.

29. The County Commissioners and Hamilton County, through their legal department ratified and approved the conduct alleged herein of the Hamilton County Sheriff's Department, the Defendant Deputy Sheriffs, and Assistant Prosecutor William P. Whalen.

30. Plaintiff's business was irreparably injured due to the acts of Defendants and their agents and employees; these acts caused Plaintiff to lose patients, inhibited Plaintiff's ability to attract new patients, and interfered with Plaintiff's ability to conduct his profession in a normal and usual manner.

31. As a direct result of the actions of Defendants and their agents and employees, Plaintiff's health was seriously and permanently impaired; the Plaintiff also suffered temporary injury to his health which, at the time, caused him great pain, suffering and expense.

FIRST CAUSE OF ACTION

32. Plaintiff incorporates into this First Cause of Action all of the allegations of paragraphs 1 through 31 as if fully restated herein.

33. The entry, intrusion, and extensive search and seizure by Defendants and their agents and employees under color of state law on April 26, 1977 constituted a deprivation of Plain-

tiff's rights and privileges secured by the Constitution and laws of the United States. Therefore, Defendants are liable to Plaintiff in damages pursuant to 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION

34. Plaintiff incorporates into this Second Cause of Action all the allegations paragraphs 1 through 33 as if fully restated herein.

35. Plaintiff, proprietor of the Rockdale Medical Center, had a right and privilege under the Fourth Amendment of the United States Constitution and the provisions of Article 1, § 14 of the Ohio Constitution and under § 2921.31, Ohio Revised Code, to prevent entry into the private portions of his office by Defendants and their agents and employees armed merely with writs of attachment for the purpose of searching for and seizing third persons named in those writs on May 19, 1977.

36. Defendants and their agents and employees, under color of state law, intruded upon Plaintiff's property, subjected Plaintiff to the deprivation of his rights and privileges secured by the Constitutions and laws of the United States and the State of Ohio. The Defendants are therefore liable to Plaintiff in damages pursuant to 42 U.S.C § 1983.

THIRD CAUSE OF ACTION

37. Plaintiff incorporates into this Third Cause of Action all of the allegations of paragraphs 1 through 36 as if fully restated herein.

38. Defendants and their agents and employees willfully and without compensating Plaintiff broke down the door to Plaintiff's private offices and deprived Plaintiff of rights secured by the Fourteenth Amendment of the United States Constitution and Article 1, § 19 of the Ohio Constitution by taking Plaintiff's property without just compensation.

39. Defendants and their agents and employees, under color of state law, deprived Plaintiff of his rights and privileges secured by the Constitutions and laws of the United

States and the State of Ohio. The Defendants are therefore liable to Plaintiff for damages pursuant to 42 U.S.C § 1983.

FOURTH CAUSE OF ACTION

40. Plaintiff incorporates into this Fourth Cause of Action all of the allegations of paragraphs 1 through 39 as if fully restated herein.

41. The entry and intrusion into Plaintiff's private office area on April 26, 1977 by defendants and their agents and employees went far beyond the scope of the search warrant which authorized that entry. Defendants and their agents and employees knowingly and willfully disregarded Plaintiff's constitutionally protected interests by searching areas not authorized in the warrant and by seizing documents and other items not authorized by the warrant.

42. These actions by Defendants and their agents and employees constituted a trespass for which Defendants are liable to Plaintiff in compensatory and punitive damages.

FIFTH CAUSE OF ACTION

43. Plaintiff incorporates into this Fifth Cause of Action all of the allegations of paragraphs 1 through 42 as if fully restated herein.

44. Defendants and their agents and employees did willfully and knowingly trespass and enter upon the premises owned by Plaintiff without leave or permission of Plaintiff and without privilege to do so on May 19, 1977.

45. This intentional trespass upon Plaintiff's property was done with a wanton, reckless and willful disregard of Plaintiff's rights. Therefore, Defendants are liable to Plaintiff for compensatory and punitive damages.

WHEREFORE, Plaintiff prays for compensatory and punitive damages against the Defendants for injuries to Plaintiff's property and property rights, for the temporary and permanent injury to Plaintiff's health, for the irreparable harm to his medical practice, for the legal expenses incurred by

Plaintiff, and for his pain and suffering in the amount of TEN MILLION DOLLARS (\$10,000,000.00) actual damages and TEN MILLION DOLLARS (\$10,000,000.00) punitive damages, plus interest, costs, expenses of litigation, including attorney's fees, plus whatever other relief in law or in equity to which the Plaintiff may be entitled.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-81-412

[Title Omitted in Printing]

**ANSWER OF DEFENDANTS, HAMILTON COUNTY,
LINCOLN J. STOKES, NORMAN A. MURDOCK,
ROBERT A. WOOD, AND ROBERT A. TAFT, II.**

(Filed May 27, 1981)

Come now the Defendants, Hamilton County; Lincoln J. Stokes, Hamilton County Sheriff; and Norman A. Murdock, Robert A. Wood, Robert A. Taft, II, constituting the Board of County Commissioners of Hamilton County, Ohio; by and through counsel, and for their Answer state:

1) That they deny the allegations in numerical paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) of the Complaint.

2) That in response to numerical paragraph nine (9) of the Complaint these Defendants admit that Bertold J. Pembaur, M. D., is a doctor of medicine licensed to practice in the State of Ohio, but they are without knowledge and information sufficient to form a belief as to the remaining allegations in numerical paragraph nine (9) of the Complaint.

3) That they admit the allegations in numerical paragraphs ten (10), eleven (11) and twelve (12) of the Complaint.

4) That in response to numerical paragraph thirteen (13) of the Complaint these Defendants admit that William P. Whalen, Jr., was and is a duly appointed Assistant Prosecuting Attorney of Hamilton County, Ohio, but these Defendants, specifically deny the remaining allegations in numerical paragraph thirteen (13) of the Complaint.

5) That in response to numerical paragraph fourteen (14) of the Complaint these Defendants state that Russell L. Jackson is a duly appointed Secret Service Officer for the Prosecuting Attorney of Hamilton County, Ohio, and as such conducts investigations for the Prosecuting Attorney.

6) That they are without knowledge or information sufficient to form a belief as to truth of the allegations in numerical paragraphs fifteen (15), sixteen (16) and seventeen (17) of the Complaint.

7) That they admit the allegations in numerical paragraphs eighteen (18) and nineteen (19) of the Complaint.

8) That these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in numerical paragraphs twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24) and twenty-five (25) of the Complaint and, therefore, deny the same.

9) That they specifically deny the allegations in numerical paragraphs twenty-six (26) and twenty-seven (27) of the Complaint.

10) That they are without knowledge or information sufficient to form a belief as to the truth of the allegations in numerical paragraph twenty-eight (28) of the Complaint.

11) That they specifically deny the allegations in numerical paragraphs twenty-nine (29), thirty (30), and thirty-one (31) of the Complaint.

12) That in response to numerical paragraph thirty-two (32) of the Complaint these Defendants adopt and incorporate by reference, their Answer to numerical paragraphs One (1) through thirty-one (31) of the Complaint as if fully set out herein.

13) That they specifically deny the allegations in numerical paragraph thirty-three (33) of the Complaint.

14) That in response to numerical paragraph thirty-four (34) of the Complaint these Defendants adopt and incorporate by reference, their Answer to numerical paragraphs one (1) through thirty-three (33) of the Complaint as if fully set out herein.

15) That they specifically deny the allegations in numerical paragraphs thirty-five (35) and thirty-six (36) of the Complaint.

16) That in response to numerical paragraph thirty-seven (37) of the Complaint these Defendants adopt and incorporate by reference, their Answer to numerical paragraphs one (1) through thirty-six (36) of the Complaint as if fully set out herein.

17) That they specifically deny the allegations in numerical paragraphs thirty-eight (38) and thirty-nine (39) of the Complaint.

18) That in response to numerical paragraph forty (40) of the Complaint these Defendants adopt and incorporate by reference their Answer to numerical paragraphs one (1) through thirty-nine (39).

19) That they specifically deny the allegations in numerical paragraphs forty-one (41) and forty-two (42) of the Complaint.

20) That in response to numerical paragraph forty-three (43) of the Complaint these defendants adopt and incorporate by reference their Answer to numerical paragraphs one (1) through forty-two (42).

21) That they specifically deny the allegations in numerical paragraphs forty-four (44) and forty-five (45) of the Complaint and every other allegation of the Complaint not admitted to be true.

FIRST DEFENSE

22) The Complaint fails to state a claim against these Defendants upon which relief can be granted.

SECOND DEFENSE

23) The Court lacks jurisdiction over the person of these Defendants.

THIRD DEFENSE

24) The Court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

25) The Court lacks ancillary and pendant jurisdiction of the state law claims in this action.

FIFTH DEFENSE

26) The Plaintiff's claims are barred by res judicata and/or collateral estoppel.

SIXTH DEFENSE

27) The Plaintiff's claims are barred by the Statute of Limitations.

SEVENTH DEFENSE

28) The Plaintiff's claims are barred by Laches.

EIGHTH DEFENSE

29) These Defendants state that at all times stated in the Complaint they acted in good faith.

NINTH DEFENSE

30) These Defendants state that at all times stated in the Complaint they acted without malice.

TENTH DEFENSE

31) These Defendants state that at all times stated in the Complaint they acted pursuant to legal process and legal authority.

ELEVENTH DEFENSE

32) These Defendants state that they are immune from liability under the judicial immunity of the Court and/or the grand jury.

TWELFTH DEFENSE

33) These Defendants state that they are not liable to respond in damages in this action under the theory of respondeat superior.

THIRTEENTH DEFENSE

34) These Defendants state that at all times stated in the Complaint they were engaged in a governmental function for which they are immune from liability.

FOURTEENTH DEFENSE

35) These Defendants state that the Plaintiff has failed to mitigate his damages, if any damage can be proven.

FIFTEENTH DEFENSE

36) These Defendants state that all Defendants acted pursuant to a validly issued search warrant and/or arrest warrant and that all actions taken were done in the good faith belief that probable cause to believe a crime had been committed and that there was probable cause to make a search and to make arrests.

WHEREFORE, these defendants, having fully answered the Plaintiff's Complaint, ask that the Complaint be dismissed with prejudice at Plaintiff's cost, and for their costs and reasonable attorney fees in defending this action.

/s/ Simon L. Leis, Jr.
Prosecuting Attorney

/s/ Roger E. Friedmann
Ass't Prosecuting Attorney
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Cincinnati, Ohio, 45202
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ATTORNEYS FOR
DEFENDANTS,
HAMILTON COUNTY, LINCOLN
J. STOKES, ROBERT A. WOOD,
NORMAN A. MURDOCK, AND
ROBERT A. TAFT, II.

[Certification Omitted in Printing]

JOINT EXHIBIT II

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

IN RE: GRAND JURY INVESTIGATION

It appearing to the Court that one Marjorie McKinley was lawfully served with a subpoena to appear before the Grand Jury at 1:00 P.M. on the afternoon of the 19th day of May, 1977, and said Marjorie McKinley did not appear; and,

It further appearing to the Court that the Grand Jury was desirous in hearing from said witness; and,

It further appearing to the Court that the said witness did not appear at 1:00 P.M. on the 19th of May, 1977 before the Grand Jury; and,

The foreman of the Grand Jury having appeared before this Court on the 19th day of May, 1977 and represented that the said witness has failed to appear and testify and that the Grand Jury was still desirous in hearing from her.

IT IS THEREFORE ORDERED, by the Court, that a Capias be issued for the arrest and detention of said witness Marjorie McKinley until further order of this Court.

TO THE SHERIFF OF HAMILTON COUNTY, OHIO;

Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness, Marjorie McKinley, whose address is 1138 Laidlow Avenue, to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on her in the within cause.

IN WITNESS THEREOF, I have hereunto set my hand at Cincinnati, Hamilton County, Ohio this 19th day of May, 1977.

/ s /

JUDGE

JOINT EXHIBIT III

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

IN RE: GRAND JURY INVESTIGATION

It appearing to the Court that the Grand Jury in Hamilton County currently has certain matters under investigation; and,

It appearing to the Court that one Kevin Maldon was lawfully served with a forthwith subpoena to appear before the Grand Jury on the morning of the 29th day of April, 1977, and said Kevin Maldon did not appear; and,

It further appearing to the Court that the Grand Jury was desirous in hearing from said witness and came before this Court earlier seeking a warrant for said witness; and,

It further appearing that one Jack Kelly, Attorney for the witness Kevin Maldon, then appeared and indicated that said witness would appear before the Grand Jury at 1:00 P. M.; and,

It further appearing to the Court that said witness did not appear at 1:00 P. M. on the 29th of April, 1977 before the Grand Jury; and,

The foreman of the Grand Jury having appeared a second time before this Court on the 29th day of April, 1977 and represented that the said witness has still failed to appear and testify and that the Grand Jury was still desirous in hearing from him.

IT IS THEREFORE ORDERED, by the Court, that a Capias be issued for the arrest and detention of said witness Kevin Maldon, until further order of this Court.

TO THE SHERIFF OF HAMILTON COUNTY, OHIO:

Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness Kevin Maldon, whose address is 865 North Hill Lane, to answer for

contempt in failing or refusing to obey the command of a subpoena lawfully served on him in the within cause.

IN WITNESS THEREOF, I have hereunto set my hand at Cincinnati, Hamilton County, Ohio this 29th day of April, 1977.

/s/

JUDGE

PLAINTIFF'S EXHIBIT 38

May 19, 1977

At approximately 2:07 p.m., we entered the office of Doctor Pembaur, at 430 Rockdale Avenue. Detective David Allen went to the reception window and I sat down in a chair to the right of the window. After a moment, Detective Allen told me he sees a lady fitting the description of Marjorie McKinley. I got up to look and Detective Allen pointed her to me. All we could see was she had dark hair and that she was wearing the same type of glasses that was described to us by the Ass't. Prosecutor, Bruce Gary. She was also wearing a very red blouse.

I sat back down and then a lady came to the window and asked Detective Allen if she could help him. He asked to see Mrs. Marjorie McKinley. The woman asked if he was a patient and he stated, "No, my name is David Allen." She then went to the woman seated and said, "Mrs. McKinley, there is a man to see you." She said, "Who?" She stated, "David Allen." Mrs. McKinley asked, "Who is David Allen?" The woman returned to the window and said, "Who are you David Allen?" He stated, "I am a policeman." With this the lady seated started to leave in a hurry, then Mr. Allen went to the side door of the reception room and was denied entrance by a black lady dressed in white.

I showed the black girl my ID and we asked to see Marjorie McKinley. The black lady stated that we could not come in and said to wait for the doctor to come. At that time I walked around to the window and a man, whom we found out later was the doctor, walked in by the black girl and together they suddenly shoved the door closed and he put the 2 x 6 board against the bottom part of the door. We tried to shove the door open but could not.

At that time the doctor stated he was calling the police. Detective Allen and myself decided to wait for the police to come before we did anything else. While we were waiting for the Cincinnati Police Department to arrive the doctor told us we had no right to be there and told us we had to leave the premises. He also told us that he had talked to his attorney's office and that he was on his way there.

The Cincinnati Police Department arrived and together we went back into the office and talked to Doctor Pembaur. We advised him that we had a legal Warrant, but he still refused to let us in. Specialist D'Erminio said he would call his Sergeant and we waited until he arrived. In the meantime I let Doctor Pembaur read the Warrants and he stated that they were illegal and the Judge had made a mistake in signing them. He said that everything that had happened was illegal.

Sergeant Ritter arrived and I showed him the Warrants and he tried to talk to Doctor Pembaur and told him if he didn't let us in we would have to break in the door. Doctor Pembaur then again said that Mr. Flax was on his way and for us to wait. We waited and I called my supervisor. He told me to call the Prosecutor and I talked to Mr. Whalen. He conferred with Mr. Leis and was told to tell me we had a legal Warrant and to go in and get her. At that time I went back to the doctor's office and told Detective Allen and Sergeant Ritter what the Prosecutor had said. He said he would like to get another opinion and called his lieutenant. After he had talked to him we went to Doctor Pembaur and advised him again and he still refused to let us in. We waited a while longer for Mr. Flax. Then the second shift Relief Sergeant came and talked to Sergeant Ritter. After a few minutes Sergeant Ritter left. The other sergeant talked to Doctor Pembaur and then we waited a while longer for Mr. Flax to arrive.

At approximately 4:05 p.m. we advised Doctor Pembaur to open the door or we would have to knock it down to get inside. He told the Cincinnati Police Department they had no business there and they should let Detective Allen and myself do it. Detective Allen and I attempted to bust it down, but to no avail. The Sergeant sent Patrolman Fox to get an axe. We waited until Patrolman Fox returned and then Specialist D'Erminio proceeded to chop it down. After the door was opened we went in.

Doctor Pembaur and his nurses attempted to keep us from approaching the lady in question by stepping in front of us and saying, "Go ahead and shove me out of the way." We

walked past them and to the lady we thought was Mrs. McKinley. I asked her if she was Mrs. McKinley and she said, "No." I asked her to let me see some ID. At first she hesitated because the other nurses told her not to, then she showed me a driver's license belonging to a Miss Krausce.

Detective Allen went to call Mr. Lally about bringing her downtown because she did fit the description of Mrs. McKinley. Detective Allen was told that Mr. Whalen was on his way to identify Mrs. McKinley. While we were waiting for Mr. Whalen to get there, Doctor Pembaur walked me through the office. I asked him to open his office door but he refused by turning and walking up the hallway. He did show me all the rooms that were open, but would not open any doors that were closed.

Mr. Whalen arrived at approximately 4:20 p.m. We went into the office and Mr. Whalen went to the lady we thought might be Mrs. McKinley. He said, "No, that is not her," and then we left the premises.

At approximately 4:40 p.m., we arrived at 1138 Laidlaw Avenue. We knocked on the door and got no response, although there was a boy lying on the couch. After pounding on the door a few times, Mr. McKinley finally opened the door. He said his wife was at work and he let me come into the house to look around. I was satisfied she was not there and we left. We returned to the Court House to drop off Mr. Whalen.

/s/ Franklin D. Webb

/s/ David Allen

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Case No. C-1-81-412

[TITLE OMITTED IN PRINTING]

Before:

The Honorable Carl B. Rubin,
Chief Judge
Cincinnati, Ohio
March 14 thru 17, 1983

* * *

**TESTIMONY OF WILLIAM WHALEN
AS ON CROSS EXAMINATION**

[12] * * *

Q. Do you recall talking to Mr. Leis that day about the access to the Pembaur Office?

A. Yes, sir.

Q. What was the nature of that conversation?

A. I went in and relayed to him a conversation I had with one of the deputies and relayed word from him back to the deputy.

Q. What were the facts you gave Mr. Leis?

A. Told him that the officer had called and stated that the doctor would not permit admission to the office.

Q. What were the instructions you relayed back to the officer?

A. That Mr. Leis said go in and look for him.

Q. Did the officer ask for any further clarification?

A. Yes, sir.

Q. What was your answer?

A. I repeated what Mr. Leis had said.

* * *

**TESTIMONY OF FRANK WEBB
AS ON CROSS EXAMINATION**

[51] The black lady was standing there talking to us. We showed her our I.D., and she said something along — wait for the doctor to come in. So I went back around in front of the reception at the window. I saw a man, who now I know as Dr. Pembaur, come to the side door and together, he and the black girl slammed the door shut and Dr. Pembaur picked up a heavy piece of wood and wedged it down between the door and the wall. I went back around and we tried to bump against the door but it didn't do any good.

We came back over in front of the receptionist window again, and we both at that time showed Dr. Pembaur our identification and told him why we were there.

THE COURT: Mr. Webb, let me make sure I understand you. Dr. Pembaur impeded you in going through that door?

THE WITNESS: Dr. Pembaur put the board down and wedged the door to where we could not get it open.

THE COURT: There's no question in your mind as to who that was, is that correct?

THE WITNESS: None at all.

THE COURT: Dr. Pembaur is in the courtroom; can you point him out?

THE WITNESS: Sure, that's him right there in the blue suit with the glasses.

By Mr. Manley:

[52] Q. Then what happened?

A. Well, we showed Dr. Pembaur our identification and while we were there, we told him why we were there. We showed him the papers. He said they were all illegal. We had no business being there and we should leave the premises.

We attempted to get him to read the papers. I'm not sure if he did at that time or not, but he did tell us he was going to call the police, so we said, go ahead, call the police. So where he went out — I'm not sure if we went completely out of the reception office or not, but we backed away from the reception window and waited for the Cincinnati Police to get on the scene.

They finally came and we showed them our identification and we showed them the papers that we had. With the Cincinnati Police, Mr. Allen and myself went back into the office, again, we approached Dr. Pembaur, we told him what the papers was, the Cincinnati policeman that were there told him they were legal papers and we should be able to enter and if Mrs. McKinley is in there, to bring her out.

Dr. Pembaur repeatedly refused to let us in, saying it was all illegal. The Judge was wrong in signing the papers, and he had called his attorney, who I believe at the time, was Mr. Flax. And he was enroute. So my partner and I decided we would wait a little while for Mr. Flax to [53] arrive. While we were waiting, one of the Cincinnati policeman called for a supervisor. A few minutes later, a Sargeant arrived on the scene. We identified ourselves to the Sargeant, showed him the papers that we had and he, with us, went back in the office. We showed Dr. Pembaur the papers. We read the papers to Dr. Pembaur.

I'm not sure if at that time or previously, but Dr. Pembaur had taken the papers himself and read them. Sargeant, of course, tried to get Dr. Pembaur to open the door so we could come in. He wouldn't open the door; he said his lawyer was on the way, so we waited awhile longer. I think at that time is when we decided we better call our office. So we called our office and we talked to Ed Lalli, who at the time was the execution officer and we talked to him. He in turn told us to call the Prosecutor's Office and gave Mr. Whalen's phone number to us.

We called Mr. Whalen, told him what the situation was, and he said, I'm not sure if he wanted us to call him back or if he just put us on hold, and went to talk to Mr. Leis or if we

called him back, and then he talked to us or whatever. In that respect, I'm not really sure of it. But anyway, Mr. Whalen told us that he had talked with Cy Leis and Cy Leis said to go in and get her. So we went back over to the office and we talked to the Cincinnati Police. It was, I guess, around three or a little before, but anyway it [54] was time for a shift change for the Cincinnati police. They called — I don't know who called, but they called and another Sargeant came and the other one left.

We showed him our I.D. We explained our situation and gave him the papers. He in turn went in and talked to Dr. Pembaur, tried to get him to open the door for us, which, of course, he refused to do.

We told the officer that Cy Leis had said to go in and get them and Dr. Pembaur said, again, I'm not sure just exactly how it was all brought out, but he then again said his lawyer was there. Wait for his lawyer to come, that he was on his way.

So we did wait for awhile longer, and then together, we went back to Dr. Pembaur, we advised him that if he didn't open the door and let us come in, that we had been told by the prosecutor to go in and get them. At that time, I'm not sure exactly how it was said, but Dr. Pembaur made a statement through the glass, alright, let the two deputy sheriffs knock the door down or something along that line. I'm not exactly sure what the words were.

Anyway, Officer Allen and myself went around to the door and together, we butted up against it, two or three times, I guess, and of course, we couldn't do anything with it. At that time we just moved away and the Cincinnati policeman took the axe and chopped the door down.

[55] Once the door was down, we went in to the back part of the office. We went to the young lady that was there that we thought was Mrs. McKinley, we asked her who she was and she told us a name, which I can't tell you right who it is, but she produced a drivers license with her picture and her name. We then knew, of course, it was not the lady we was looking for.

We talked to Dr. Pembaur, and he then showed me around the office itself, walked with me all through the office. We looked in each of the little offices that was there, I think, and we — I don't think we attempted to even open any doors that were closed. Anyway, we came back into the other part of the office and I imagine maybe five minutes later, Mr. Whalen came on to the scene, we saw him, we walked over to him and took him to the young lady that was in question. He said no, that's not her. We left.

Mr. Whalen, Officer Allen and myself went out and got in the car and went out to Laidlaw Avenue, supposed to be the residence of Mrs. McKinley. We found it on the door, finally we got a response, a man identified himself, I think as her husband. I'm not sure. But he told us to come in and I walked around the premises. He said his wife was not there, that his wife was at work. So we left Laidlaw Avenue and came back downtown. I dropped off Mr. Whalen, and Mr. Allen and I went on home.

[56] THE COURT: How long elapsed between the time that you came to Dr. Pembaur's office and the door was broken open?

THE WITNESS: I'd say close to two hours.
By Mr. Manley:

Q. Did you understand the instructions that were given to you by Mr. Whalen relayed from Mr. Leis to include chopping down the door?

MR. FRIEDMANN: Objection.

THE COURT: Sustained.

Q. During that two hour period, did you make any request for a search warrant?

MR. FRIEDMANN: Objection, Your Honor.

THE COURT: I don't see the relevance of that, Mr. Manley. What difference does it make whether they requested a search warrant or not if they had a capias?

Q. Did Mr. Whalen bring with him a search warrant when he came out?

MR. FRIEDMANN: Objection.

THE COURT: Sustained. There's just one issue here.

Was there a violation of this plaintiff's constitutional rights by an attempt to serve a capias? That's all.

Q. In the past, have you served capiases on property of persons other than the object or the subject of the [57] capias?

A. Yes.

Q. Have you done that without a search warrant in the past?

A. Yes.

Q. On occasion, have you used force to do that in the past?

A. Never.

* * *

TESTIMONY OF SHERIFF LINCOLN STOKES AS ON DIRECT EXAMINATION

[216] * * *

Q. On the basis of your review of Exhibit 38 and whatever other information you received from your subordinates, did you make a judgment as to whether or not your deputies on the 19th of May, 1977 adhered to the policies of your department at Dr. Pembaur's office?

A. I made judgments from information submitted to me and it was my judgment that the deputies acted fully and competently within their authority.

Q. Do you have a policy whether a deputy has a question as to what he should do, what your policy is with respect to that?

A. What timeframe?

Q. In 1977.

A. In answer to that, the policies and procedures are set out by the Ohio Revised Code, and any court decisions relating to such activities are reviewed and furnished to the deputies working that particular type of job.

* * *

[218] * * *

Q. Was there a policy to consult the Prosecutor's Office?

A. The policy to consult the Prosecutor's Office is determined upon the facts, circumstances and situations of each case. I cannot answer your question in a generality, because every aspect of the incident to be reviewed has to be considered.

Q. Well, in this particular case, was it a violation of your policy for the Deputy Lalli to refer the Deputy Webb to the Prosecutor's Office?

A. I would not consider that a violation of a Sheriff's Office policy. However, you have to consider each situation upon its own facts and circumstances.

Q. Then was that in conformity with your policy?

A. I had no objection to it and under the circumstances, I thought it was the proper thing to do.

* * *

TESTIMONY OF WILLIAM WHALEN AS ON DIRECT EXAMINATION

[365] * * *

Q. Mr. Whalen, with regard to May 19, 1977, are you [366] aware that certain deputy sheriffs arrived at Dr. Pembaur's office on that day to serve a capias?

A. I was not aware until they called me on the telephone.

Q. Do you know approximately what time they called you?

A. I believe the first time was some time after two in the afternoon.

Q. What did they relate to you?

A. That they were out there and they had been denied entry, and believed that the two people they were looking for were inside and wanted to know what to do.

Q. What did you tell them?

A. I put Frank Webb on hold and went in and talked with Mr. Leis; Mr. Leis told me to tell them to go in and get them. I relayed those words to Deputy Webb over the telephone.

* * *

[367] * * *

Q. Mr. Whalen, in your position as an Assistant Prosecuting Attorney you are familiar with certain case law and decisions that are rendered by certain courts?

A. Yes, sir.

Q. On May 19, 1977, did you believe that a deputy sheriff with a lawfully issued capias could go on to the premises of a third person to execute that capias?

A. Yes, sir, I did.

Q. To your knowledge, was there ever any other situation where the deputy sheriffs had been faced with a [368] situation where they had a capias for the arrest of a person and they had gone on to the premises of a third person and were denied entrance and had to use force to gain entrance?

A. I've never experienced any.

Q. In all your time as an Assistant Prosecuting Attorney?

A. That's correct. I'm aware of no instance.

* * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-81-412
(Rubin, J.)

[TITLE OMITTED IN PRINTING]

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that the following facts may be admitted into evidence without further testimony.

- 1) That Marjorie McKinley was employed by Dr. Bertold J. Pembaur at the Rockdale Medical Center on May 19, 1977.
- 2) That Marjorie McKinley was at the office of Dr. Bertold J. Pembaur at the Rockdale Medical Center performing her duties on May 19, 1977.
- 3) That Marjorie McKinley was at the Rockdale Medical Center on May 19, 1977 when two Hamilton County Deputy Sheriffs arrived to serve a capias on her.
- 4) That after the arrival of the two Deputy Sheriffs she went to a stairway going to the second floor of the building where the Rockdale Medical Center is located.
- 5) That after the departure of the Deputy Sheriffs and police officers Marjorie McKinley came out of the stairway and back into the offices of the Rockdale Medical Center.

IT IS SO STIPULATED.

/s/ Andrew S. Lipton
Trial Attorney for Plaintiff

/s/ Roger E. Friedmann
Ass't Prosecuting Attorney
Trial Attorney for Defendants,
Whalen, Jackson and Hamilton
County

Jerome Luttenegger
Ass't City Solicitor
Trial Attorney for
City of Cincinnati

[Submitted to the Court (R.4)]